SUPREME COURT OF VICTORIA
COURT OF APPEAL

S APCR 2019 0017
S APCR 2019 0071

JACK WILLIAM ASTON — Applicant

v

THE QUEEN — Respondent

JUDGES:	PRIEST, BEACH and KAYE JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	7 October 2019
DATE OF JUDGMENT:	14 October 2019
MEDIUM NEUTRAL CITATION:	[2019] VSCA 225
JUDGMENT APPEALED FROM:	*DPP v Aston* (Unreported, County Court of Victoria, Judge Stuart, 23 October 2018) (Conviction); [2018] VCC 2258 (Sentence)

CRIMINAL LAW – Appeal – Conviction – Applicant drove chartered bus carrying 14 passengers into bridge – Six passengers suffered serious injuries from collision – Convicted on six counts negligently causing serious injury – Prosecution and defence counsel failed to inform trial judge of statutory alternative verdict – Whether substantial miscarriage of justice occasioned by alternative verdict of dangerous driving causing serious injury not being left to jury – Whether trial judge's direction on negligence deficient – Whether improper for informant to act as 'shower' for purposes of view – Leave to appeal granted with respect to failure to leave statutory alternative verdict – Appeal allowed – Convictions for dangerous driving causing serious injury substituted – *Crimes Act 1958* s 422A; *Jury Directions Act 2015* ss 11, 12, 16 – *Bouch v The Queen* (2017) 270 A Crim R 478, *King v The Queen* (2012) 245 CLR 588 applied; *James v The Queen* (2014) 253 CLR 475 considered.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Ms C A Boston and Dr M Fitzgerald	Doogue + George
For the Respondent	Ms F L Dalziel QC with Ms K Farrell	Mr John Cain, Solicitor for Public Prosecutions

PRIEST JA
BEACH JA
KAYE JA:

Introduction and overview

1 At about 10.22 am on 22 February 2016, the applicant drove a bus carrying 14 passengers into the Montague Street Bridge, South Melbourne, a notorious site for collisions involving large vehicles. As a result, six passengers suffered serious injuries.

2 On 9 March 2016, police arrested and interviewed the applicant, and, on 21 September 2016, laid some 23 indictable and summary charges against him.

3 Following his committal for trial on 14 November 2017, an indictment ultimately was filed in the County Court charging the applicant with negligently causing serious injury[1] (six charges — charges 1 to 6). After a contested 12 day trial, a jury found the applicant guilty of all six charges on 23 October 2018.

4 On 17 December 2018, following a plea hearing on 13 December 2018, the judge sentenced the applicant to be imprisoned for two years and nine months on charge 1 (which became the base sentence), and for three years on each of charges 2 to 6. The judge directed that six months of the sentences on charges 2 to 6 be served cumulatively with each other and with the sentence on charge 1, producing a total effective sentence of five years and three months' imprisonment, upon which the judge fixed a non-parole period of two years and six months.[2]

5 By an application for extension of time dated 22 January 2019, the applicant initially sought leave to appeal only against sentence.[3] By a subsequent application

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1 *Crimes Act 1958*, s 24. The maximum penalty is 10 years' imprisonment.

2 The judge also ordered that the applicant's driver's licence be cancelled for three years.

3 The relevant Notice contained three grounds:

1. The learned sentencing judge erred in treating this as a 'serious example' of the offence of negligently causing serious injury.
2. The learned sentencing judge erred in failing to take into account the likelihood of

for extension of time dated 5 April 2019,[4] however, the applicant also sought leave to appeal against conviction on six grounds:

1. The convictions are unreasonable or unable to be supported having regard to the evidence.
2. The jury directions diluted the extent of negligence required to establish the offence charged, in that the learned trial judge contrasted the degree of negligence required only with 'minor' breaches of the law amounting to civil negligence, and did not direct the jury that a person acts with criminal negligence only if his or her acts fall so far short of the standard of care a reasonable person would have exercised and involved such a high risk of death or really serious injury that it deserves criminal punishment.
3. A substantial miscarriage of justice has been occasioned by the jury not being permitted to consider the statutory alternative of dangerous driving causing serious injury.
4. The bus driver's comment on the view, in the presence of the jury, that 'the Montague Street Bridge is well known in the bus industry' has resulted in a substantial miscarriage of justice.
5. The swearing in of the informant as the 'shower' for the purposes of the view, and the informant performing that function, have resulted in a substantial miscarriage of justice.
6. A substantial miscarriage of justice has been occasioned by an accumulation of errors.

6 Oral argument proceeded in this Court on 7 October 2019, at the completion of which we informed the parties that we had concluded that the application should succeed on ground 3; the appeal should be allowed; and the convictions sustained in the court below should be set aside. At our invitation, counsel for the respondent then sought instructions as to whether the Court should make orders under s 277(1)(c) of the *Criminal Procedure Act 2009* ('CPA'),[5] in effect substituting verdicts

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imprisonment having a significant deleterious impact upon the applicant's mental health.

3. The individual sentences, orders for cumulation, total effective sentence, non-parole period and licence disqualification period are manifestly excessive, having regard to the significant factors in mitigation, including the applicant's own injuries, remorse, lack of criminal history, excellent prospects for rehabilitation, increased burden of imprisonment and poor mental health.

4 The Registrar granted the extension of time on 15 April 2019. See *Criminal Procedure Act 2009*, s 313(1).

5 Section 277(1)(c) provides:

277 Orders etc. on successful appeal

(1) If the Court of Appeal allows an appeal under section 274, it must set aside the conviction of the offence ("offence A") and must—

of dangerous driving causing serious injury[6] for the convictions returned at trial. Having sought those instructions, senior counsel for the respondent submitted that, in the unusual circumstances of this case, it was open to the Court to substitute verdicts of dangerous driving causing serious injury.[7]

7 For the reasons that follow, we are of the opinion that the application for leave to appeal against conviction should succeed solely on ground 3 (the failure to leave the statutory alternative of dangerous driving causing serious injury). Leave to appeal against conviction will be granted on that ground; the appeal will be allowed; the convictions on the six charges of negligently causing serious injury will be set aside; and in their stead, in each case judgments of conviction for dangerous driving causing serious injury will be imposed. We will impose a combination sentence involving a period of imprisonment equivalent to the time that the applicant has already served and a community correction order ('CCO') of two years' duration.[8]

Overview of the collision and its aftermath

8 So that the issues in the case may be understood, it is necessary to provide an overview of the essential facts.

9 As we have indicated, in the morning of Friday, 22 February 2016, the applicant, then aged 53 years, drove a bus into the Montague Street Bridge, South

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(c) if—

(i) the appellant could have been found guilty of some other offence (***offence B***) instead of offence A; and

(ii) the court is satisfied that the jury or, in the case of a plea of guilty to offence A, the trial judge must have been satisfied of facts that prove the appellant was guilty of offence B—

enter a judgment of conviction of offence B and impose a sentence for offence B that is no more severe than the sentence that was imposed for offence A; …

6 See *Crimes Act 1958*, s 319(1A). The maximum penalty is five years' imprisonment.

7 Counsel for the applicant had submitted that, should ground 3 succeed, the Court should substitute convictions for dangerous driving causing serious injury. Initially, the respondent had submitted in writing that, in the event that ground 3 was upheld, a retrial should be ordered.

8 See [158] below.

Melbourne, which is three metres in height (that is, a shade under ten feet). It was a sunny day, and, although the applicant told police that the sun visors were down, it seems that there was nothing impeding his view of the road or its surrounds.[9]

10 The applicant had general experience as a bus driver, and specific experience driving the bus involved in the collision. He had been employed full-time by Gold Bus Ballarat since 13 April 2015 (having previously driven on a casual basis). His duties included driving prescribed routes such as school routes and 'V/Line' services, and charter work. He held a heavy rigid licence, appropriate for driving the bus. Importantly, the applicant told police that he was aware that the height of the bus was '3.8 metres'.[10]

11 In simple terms, the bus struck the bridge because, over a distance of some 293 metres — which the bus took 48 seconds to travel — the applicant failed to observe a number of signs warning of the bridge's height or, apparently, the bridge itself. Having made no attempt to brake or deviate course, the applicant drove the bus into the bridge at a speed of 56 kilometres per hour, breaking his own neck, and seriously injuring six passengers. The prosecution case was that the applicant failed to pay proper lookout, so that he failed to pay adequate attention to the busy urban road and its surrounds for a period of driving of almost a minute, over a distance of around 293 metres, failing to see or obey four warning signs before the bridge; a detour sign before the bridge; a warning sign, and flashing red warning lights on the bridge; and the bridge itself.

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9 A witness, Nicholas Alexandrou, worked at a car dealership on the corner of Montague Street and Normanby Road. He gave evidence that on the day of the collision, tree branches obscured the sign 72 metres from the bridge which stated, 'LOW BRIDGE AHEAD, 3.0 m (10 ft)': see [16] below. His evidence was, however, contradicted to an extent by another witness, Morris Padula, who worked for a firm, 'Downer'. His job was to inspect road pavement for defects, and to ensure that road signs were 'clearly visible' (which included ensuring that they were not obscured by trees). He had done an inspection along Montague Street on the morning of the collision and saw nothing that needed to be attended to. Moreover, when interviewed, the applicant told police nothing on the roadway obscured his view: see [21] below.

10 The actual height of the bus was 3.61 metres, although a sticker on the driver's console to the left hand side of the steering wheel of the bus stated that its height was 3.8 metres.

12 On the day of the collision the applicant had driven the bus from Ballarat. After a number of other jobs, he drove to the Convention Centre at South Wharf. He was to pick up passengers and drive them to the Novotel Hotel on the Esplanade, St Kilda. Fourteen passengers boarded, and the applicant set off from the Convention Centre. Curiously, despite never having been to the area where he was to drop off the passengers, the applicant made no attempt to plan the route that he would take.

13 After leaving the Convention Centre, the applicant drove the bus onto Montague Street, and drove around a sweeping left-hand bend to continue in a south-easterly direction. Thereafter, as we have said, the bus travelled a distance of 293 metres in 48 seconds, before colliding with the bridge at a speed of 56 kph. There were several signposts displayed over the route that the applicant did not see (or, at least, ignored).

14 The first was a group of signs situated on a concrete island in the middle of the road at the sweeping bend, 293 metres from the bridge. There were three signs in the group, one under the other. The sign at the top of the three was a directional sign, showing the five directions in which the road lanes diverted at the next traffic signals. That sign had a green background, with white directional arrows and writing (together with several smaller boxes indicating parking areas and other features). The middle sign in the group was divided in colour into yellow and red. In the top, yellow portion of the sign, in black-coloured writing it advised, 'LOW BRIDGE AHEAD, 3.0 m HEIGHT'; and in the lower part of the sign, emblazoned in white on a red background were the words, 'HIGH VEHICLES DETOUR AHEAD'. At the bottom in the group of three was a yellow sign with words in black, '3.0 m BRIDGE, TRUCKS DO NOT ENTER MONTAGUE ST'.[11]

15 Following this first group of signs, there was a straight stretch of road, on a slight decline. At the intersection of Munro Street, the applicant stopped the bus at a red light for about ten seconds. Thereafter, 141 metres from the bridge on the nature

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[11] Self-evidently, however, any driver reading this lowest sign in the group of three had already entered Montague Street.

strip to the passenger side of the road, was the second group of two signs. The lower of the two signs depicted a white ship on a blue background, with the words 'Station Pier' and an arrow in white. Above it, was a yellow and red coloured sign. In the upper, yellow section were the words, 'LOW BRIDGE AHEAD, 3.0 m HEIGHT', written in black; and in the lower, red coloured section were the words, 'HIGH VEHICLES DETOUR', written in white with an arrow (also white) pointing to the right.

16 The third sign was 72 metres from the bridge. It also was primarily yellow and red. In the upper, yellow part of the sign, written in black were the words (and numerals), 'LOW BRIDGE AHEAD, 3.0 m (10 ft)'; and in the lower, red part of the sign, written in white were the words, 'TRUCK DETOUR', with an arrow pointing to the right. Closely following that sign, 55 metres from the bridge, was the fourth, a diamond-shaped yellow sign with 'LOW CLEARANCE 3.0 m' written in black.

17 Twelve metres from the bridge was a fifth sign on the driver's side of the road. It was mainly yellow, rectangular in shape, and in black letters said, 'LOW BRIDGE DETOUR', with an arrow pointing right.

18 A sixth sign, on the bridge itself, was primarily white. It sat above a red and white 'candy cane' strip running the length of the bridge over the road, and had written on it in black, ' LOW CLEARANCE, 3.0 m (10 ft)'.

19 Significantly, the bus had triggered a sensor at Normanby Road, about 81 metres prior to the bridge, which activated two flashing red lights sitting either side of a sign on the bridge structure. The words 'HIGH VEHICLE' and 'DETOUR' — accompanied by an arrow pointing right — alternately flashed on the sign, together with the flashing red lights.

20 None of these signs caused the applicant to stop or change course. He drove the bus into the bridge, the force of the impact causing the roof of the bus to be torn back to approximately the fifth row of seating, resulting in the most severe injuries being caused to those seated in the front half of the bus.

21 When interviewed on 9 March 2016, the applicant told police that he:

- had been a driver for Gold Bus Ballarat since 2013;
- was the holder of 'heavy rigid', car and rider licences and a driver accreditation certificate (for commercial passenger vehicles);
- did 'school run and charter work' five days a week, 'and if there's overtime, weekend work';
- was not on any medication at the time of the incident and had not drunk any alcohol;
- was handed the relevant 'job sheet' when he arrived at the Convention Centre and the tour guide told him that they were 'running late';
- was 'not familiar with that area' and that he was 'very confused';
- 'roughly [knew] how to get there' so he 'just set off';
- did not 'get a chance' to put on his GPS because he 'had to stand at the side of the bus holding the sign waiting for everybody';
- 'just can't recall seeing the bridge … or hitting it';
- did not see, or recall seeing, any of the road signs warning of the low clearance bridge ahead;
- '… was concentrating on driving, [he] suppose[d], looking at what's going on around [him]. But … [he] didn't see the signs';
- did not know why he did not see the signs;
- knew the height of the bus, as written on the dashboard, was 3.8 metres;
- considers himself an experienced driver;
- was looking ahead and paying attention to his driving at the time of the collision;
- did not apply brakes leading up to the collision;
- was not in a hurry at all that day;

- did not 'take a moment to do any planning' with regard to the routes for that bus trip;
- was 'fully in control of the bus at the time of the collision'; and
- had nothing on the roadway at the time of the collision to obstruct his vision.

Conviction ground 3: Should the alternative of dangerous driving causing serious injury been left to the jury?

22 It is convenient to turn first to ground 3.

23 Although the applicant had been committed for trial on six charges of negligently causing serious injury and six alternative charges of dangerous driving causing serious injury,[12] the indictment contained only six charges of negligently causing serious injury.

24 Despite the fact that charges of dangerous driving causing serious injury were not specifically pleaded on the indictment as alternatives to the six charged offences, by virtue of s 422A(1A) of the *Crimes Act 1958*, dangerous driving causing serious injury is a statutory alternative to the offence of negligently causing serious injury. Thus, s 422A(1A) provides:

> (1A) If on the trial of a person charged with an offence against section 24 (negligently causing serious injury) the jury are not satisfied that he or she is guilty of the offence charged but are satisfied that he or she is guilty of an offence against section 319(1A) (dangerous driving causing serious injury), the jury may acquit the accused of the offence charged and find him or her guilty of the offence against section 319(1A) and he or she is liable to punishment accordingly.

25 We consider that, when a charge of negligently causing serious injury arises out of the driving or management of a motor vehicle, dangerous driving causing serious injury is, by its very nature, ordinarily an alternative.

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12 He was also committed on a charge under s 23 of the *Crimes Act 1958* of reckless conduct endangering serious injury (to the other passengers), and an offence pursuant to s 17 of the *Bus Safety Act 2009*.

26 In a case such as this, the offence of negligently causing serious injury is established where the jury is satisfied that the accused unjustifiably and to a gross degree failed to observe the standard of care which a reasonable person would have observed in all of the circumstances (that conduct having caused serious injury). The adjective 'gross' conveys the notion that the negligence must be of a high order, involving a great falling short of the standard of care which a reasonable person would have exercised in all of the circumstances, and involving a high risk that serious injury would follow from that conduct.[13]

27 On the other hand, negligence is not a necessary element of the offence of dangerous driving causing serious injury. The offence of dangerous driving causing serious injury is committed where a person has driven a motor vehicle in a manner which, in a real sense, was dangerous to the public. That is, the driving must subject the public to a risk beyond those that are ordinarily associated with the driving of a motor vehicle, including driving by persons who may, on occasions, exercise less than due care and attention.[14]

28 That negligence is not a necessary element of dangerous driving causing death or serious injury was made clear by French CJ, Crennan and Kiefel JJ in their Honours' joint judgment in *King*. What is instead required is an assessment of the degree of risk or danger created by the accused person's conduct. Their Honours explained that although negligence may and, in many if not most cases will, underlie dangerous driving, a person may drive with care and skill and yet drive dangerously.[15] Hence, it is not appropriate to treat dangerousness as covering an interval in the range of negligent driving which is of lesser degree than driving which is 'grossly negligent'.[16] Notwithstanding that this is so, however, the degree

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13 *Bouch v The Queen* (2017) 270 A Crim R 478, 518 [139] (Priest JA) ('*Bouch*').

14 *King v The Queen* (2011) 245 CLR 588, 609 (French CJ, Crennan and Kiefel JJ) ('*King*'). See also *McBride v The Queen* (1966) 115 CLR 44, 49–50 (Barwick CJ); *Jiminez v The Queen* (1992) 173 CLR 572, 579.

15 *King*, 605 [38]. See also 608–9 [46].

16 Ibid.

of danger created by the driving of a motor vehicle commonly bears a close correlation to the degree of want of care exercised by the accused person. That is, the degree of danger created by the accused's driving may significantly influence an evaluation by the jury of the extent of any departure by the accused from the applicable standard of care, and may thus inform an assessment of whether any failure to observe the applicable standard of care was, in all the circumstances, 'gross'.

29 In the present case, the essential prosecution case was, as we have mentioned, that the applicant failed to keep a proper look out. The degree of negligence involved in that failure was connected to the particular danger to which the applicant, by his driving, exposed his passengers and other road users. Conceptually, we consider that it would have been open to the jury to acquit the applicant of negligently causing serious injury — on the ground that they were not satisfied that the degree of negligence was gross — yet be satisfied that the applicant's driving was dangerous, in the sense that, by failing to keep a look out, he exposed his passengers and others to danger sufficient to establish the offence of dangerous driving causing serious injury.

30 In considering the present ground, it is necessary to have regard to the *Jury Directions Act 2015* ('JDA'), the terms of which dictate that, when there is an alternative verdict open on the evidence in a trial, the prosecution has an obligation to so inform the judge (in turn enlivening collateral obligations in defence counsel). Hence, so far as relevant, s 11 of provides:

> **11 Counsel to assist in identification of matters in issue**
>
> After the close of all evidence and before the closing address of the prosecution—
>
> (a) the prosecution must inform the trial judge whether it considers that the following matters are open on the evidence and, if so, whether it relies on them—
>
> (i) any alternative offence, including an element of any alternative offence;
>
> …; and
>
> (b) defence counsel must then inform the trial judge whether he or she

considers that the following matters are or are not in issue—

…

(iii) any alternative offence, including an element of any alternative offence;

…

31 The effect of s 12 of the JDA is that, after the issue of possible alternative verdicts is identified in accordance with s 11, 'prosecution and defence counsel must each request that the trial judge give, or not give, to the jury particular directions in respect of' any alternative verdicts and the evidence in the trial relevant to them; and the effect of s 14 is that a trial judge must give a requested direction concerning alternative verdicts 'unless there are good reasons for not doing so'. Further, by virtue of s 16(1), the trial judge must give the jury a direction if he or she considers that 'there are substantial and compelling reasons for doing so even though the direction has not been requested under section 12'.

32 Remarkably, at the close of the evidence and before closing addresses in the present case, neither the prosecutor nor defence counsel informed the trial judge that dangerous driving causing serious injury was an alternative verdict open on the six offences charged in the indictment. Indeed, there is no indication that his Honour knew of the statutory alternative. Certainly, no alternative verdict was left to the jury.

33 Counsel for the applicant in this Court contended that the failure to leave the statutory alternative was an 'oversight', which could have been avoided if the parties had complied with s 11 of the JDA. There were, counsel submitted, no substantial and compelling reasons for not leaving the statutory alternative for the jury's consideration, notwithstanding the lack of any request by prosecution or defence. In the present case, the applicant's counsel submitted, the alternative offence was clearly 'open on the evidence'. Necessarily, it was appropriate to leave to the jury an alternative offence differing only on the question of the degree of objective fault.

34 The guilty verdicts on the charges of negligently causing serious injury, the applicant's counsel contended, cannot mean that no substantial miscarriage of justice

has occurred. As has been observed, the variety of choices offered to a jury is inherently likely to affect the choice made, particularly when a particular choice was not the only or inevitable choice.[17] Changes effected by the JDA have not effected a change in human nature. Convictions for negligently causing serious injury, counsel submitted, were not inevitable. If the jury had been asked to consider both negligently causing serious injury and dangerous driving causing serious injury, the jury may well have considered that failing to see the various signs did not amount to criminal negligence, but that driving into the bridge amounted to dangerous driving.

35 Counsel for the respondent acknowledged that the prosecutor did not, as he was required by s 11(a)(i) of the JDA to do, inform the trial judge of the statutory alternative. Whilst the JDA requires the prosecutor to inform the trial judge of available alternatives, diligent defence counsel should ensure that he or she is aware, by his or her own endeavours, of any such alternatives. Absent some evidence from trial defence counsel to the contrary, the respondent's counsel submitted, it should not be assumed that he was not aware of the availability of the statutory alternative offence. In that regard, counsel for the respondent noted, first, that the applicant's counsel at trial had also appeared at committal (and would have been aware of the original charges); and, secondly, that both *King* and *Bouch* — in which s 422A and alternative verdicts were canvassed — were discussed at length during the trial, so that counsel must have been alerted to the provisions of s 422A. Counsel for the respondent submitted that the likely explanation for defence counsel not raising the possible alternative verdicts was that he considered that an 'all or nothing' defence was the best tactical approach, believing that there was a strong prospect of a complete acquittal.

36 Furthermore, the respondent's counsel submitted, the manner in which the trial was defended was not concerned with distinctions in the degree of fault. The defence simply was that the applicant was not at fault, there being no intermediate

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17 Counsel cited *Gilbert v The Queen* (2000) 201 CLR 414, 441 [101] (Callinan J) ('*Gilbert*'). See [50] below.

or alternative factual position pursuant to which the jury could have found that the applicant was inattentive for a shorter period of time than alleged, and thus not criminally negligent. The applicant's case, it was submitted, was that he did not see any of the signs or the bridge, but that this was due to the fault of others, not his own.

37 Notwithstanding the failure by the prosecutor or defence counsel to ask that the statutory alternative of dangerous driving causing serious injury be left to the jury, we are of the opinion that the trial judge's failure to leave that alternative has occasioned a substantial miscarriage of justice.

38 In *James*,[18] the appellant faced trial on a presentment containing one count of intentionally causing serious injury and an alternative count of recklessly causing serious injury. He was convicted on the first count. It was the prosecution case that the appellant had deliberately driven his car into another. The defence case was that the appellant had not intended to hit the victim; and, in the alternative, that he had been acting in self-defence (the victim having threatened him with a knife). It was not disputed that the injuries suffered by the victim were other than extensive and life-threatening. Indeed, it was not suggested at trial that the injuries were other than 'serious injury'. Further, it apparently was accepted that, if the appellant was proven to have hit the victim deliberately, he must have intended to cause serious injury. While deliberating, the jury sought clarification of the distinction between the mental elements of each of the two charges before them. In the course of discussion as to how to answer the jury's question, the prosecutor raised for the first time whether the jury should also be instructed of the availability of a further alternative verdict, that the appellant had intentionally caused injury (rather than serious injury). (Recklessly causing injury was also a statutory alternative.) The trial judge refused to give such an instruction, stating that the prosecution case had not been framed in that way and to introduce it at that stage would deprive the appellant of the possibility of an acquittal on the basis on which the case that had

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18 *James v The Queen* (2014) 253 CLR 475 ('*James*'). See also *James v The Queen* (2013) 39 VR 149.

been presented. Counsel for the accused did not disagree.

39 Importantly, defence counsel in *James* deliberately — and for tactical reasons — decided not to ask the trial judge to direct the jury as to the lesser alternatives of intentionally causing injury or recklessly causing injury.

40 Also importantly, the appellant in *James* was convicted by the jury on 22 November 2011, prior to the promulgation of the JDA.[19] Thus, unlike the position that now obtains, there was no distinct statutory obligation upon the prosecution to inform the trial judge that an alternative offence (or element) was 'open on the evidence', and no distinct statutory obligation on defence counsel to inform the trial judge whether any alternative offence was relied upon.

41 In the circumstances of that case, the majority in *James* rejected the contention that the alternative should have been left to the jury for the following reasons:[20]

> Fairness to the appellant did not require that either alternative verdict be left. To have instructed the jury on the alternative verdicts at the conclusion of the trial might rightly be judged to have jeopardised the appellant's chances of acquittal. It might have done so because the central issue at trial — had the prosecution excluded the reasonable possibility that the appellant struck [the victim] inadvertently as he manoeuvred the vehicle — may have been blurred in a summing-up which introduced additional, uncharged, pathways to conviction.

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19 The forerunner to the JDA — the *Jury Directions Act 2013* — came into operation on 1 July 2013. Section 16(1)(a) of that Act abolished the common law requirement for a trial judge to direct the jury about any 'alternative offences open on the evidence but which have not been identified as such during the trial'. Moreover, the obligation to inform the judge of any alternative offences was placed on the shoulders of defence counsel. Section 10 provided (emphasis added):

> **10 Defence counsel must inform trial judge of matters in issue**
>
> After the close of all evidence and before the closing address of the prosecution, defence counsel must inform the trial judge whether the following matters are or are not in issue—
>
> (a) each element of the offence charged;
>
> (b) any defence;
>
> (c) *any alternative offence, including an element of any alternative offence*;
>
> (d) any alternative basis of complicity in the offence charged and any alternative offence.

20 *James*, 493 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

42 Their Honours had earlier observed:[21]

> … It is not the function of the trial judge to prevent the acquittal of the accused should the prosecution fail to prove guilt of the offence, or offences, upon which it seeks the jury's verdict. At a trial at which neither party seeks to rely on an included offence, the trial judge may rightly assess that proof of the accused's guilt of that offence is not a real issue. In such an event, it would be contrary to basic principle for the trial judge to embark on instruction respecting proof of guilt of the included offence.[22]
>
> The trial judge's duty with respect to instruction on alternative verdicts is to be understood as an aspect of the duty to secure the fair trial of the accused. The question of whether the failure to leave an alternative verdict has occasioned a miscarriage of justice is answered by the appellate court's assessment of what justice to the accused required in the circumstances of the particular case. That assessment takes into account the real issues in the trial and the forensic choices of counsel. As earlier noted, not infrequently defence counsel will decide not to sully the defence case (that the only proper verdict is one of outright acquittal) by an invitation to the jury to consider the accused's guilt of a lesser offence. Such a forensic choice does not prevent counsel from submitting that the alternative verdict should nonetheless be left. Much less does it prevent counsel from making that submission where, as here, he or she is asked about the matter. It remains that the forensic choices of counsel are not determinative. The duty to secure a fair trial rests with the trial judge and on occasions its discharge will require that an alternative verdict is left despite defence counsel's objection.

43 In an earlier passage, the majority made it plain that the trial judge may have an obligation to leave an alternative verdict to the jury notwithstanding the tactical decisions of counsel. It was observed:[23]

> Discharge of the trial judge's role in ensuring fairness to the accused requires that the jury receives instruction on any defence or partial defence, provided there is material raising it, regardless of the tactical decisions of counsel. Among other things, this recognises the forensic difficulty of relying on inconsistent defences. The tactical decision not to rely on a defence or partial defence, whether objectively sound or otherwise, does not relieve the trial judge of the obligation to instruct the jury on how on a view of the facts a defence or partial defence arises.
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> Of course, forensic considerations may equally be against defence counsel inviting the jury to consider the accused's guilt of a lesser offence. The

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21 Ibid 490-1 [37]-[38].

22 See [*Alford v Magee* (1952) 85 CLR 437 at 466; *Tully v The Queen* (2006) 230 CLR 234 at 257 [79] per Hayne J; *R v Getachew* (2012) 248 CLR 22 at 34-35 [29] fn 35] and see also *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106 [36] per French CJ, Gummow, Hayne and Crennan JJ; *R v Khazaal* (2012) 246 CLR 601 at 623 [73] per Gummow, Crennan and Bell JJ; *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31]; 295 ALR 624 at 631-632; *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 152-153 [28].

23 *James*, 488–9 [31]–[32] (citation omitted).

> submission may be inconsistent with the tenor of the defence case. Nonetheless fairness to the accused may require that the jury be directed of the availability of the alternative verdict. In such a case the failure to do so would be a miscarriage of justice.

44 An understanding of the facts in *James* illuminates why it would not have been appropriate to have left a verdict of intentionally or recklessly causing injury to the jury as an alternative to the counts of intentionally causing serious injury and recklessly causing serious injury. The critical issues in that case were, first, whether the applicant deliberately drove his vehicle at the victim; and, secondly, whether he did so in self-defence. As a result of being struck by the applicant's motor vehicle, the victim had suffered particularly severe injuries (which, among other things, had left him wheelchair-bound).[24] In light of the manner in which the injuries were caused, and the extent of the injuries, leaving the lesser alternative verdict may have invited a compromised verdict, unconnected to the real issues in the trial.

45 Returning to the JDA, s 15 provides that, subject to s 16, 'the trial judge must not give the jury a direction that has not been requested under section 12'. Quite plainly, the prohibition contained in s 15 presupposes adherence by both prosecution and defence counsel to the obligations imposed on them by s 11: that is, by the prosecution informing the judge as to any alternative offence open on the evidence, and defence counsel informing the judge whether any alternative offence is in issue. Section 12 only comes into play '[a]fter the matters in issue have been identified in accordance with section 11'. It is only once counsel have identified matters in accordance with s 11 — for present purposes, a possible alternative offence — that 'the prosecution and defence counsel must each request that the trial judge give, or not give, to the jury particular directions'. In this case, however, no direction was 'requested under section 12', since neither counsel seems to have appreciated that dangerous driving causing serious injury was an alternative to each of the charged offences.

46 It is plain that a trial judge is not obliged to leave a theoretically open

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[24] See *James v The Queen* (2013) 39 VR 149, 158 [25] (fn 33) (Whelan JA).

uncharged alternative offence to the jury, if the uncharged offence is not a realistic alternative.[25] Where on the facts of the case, however, a jury might reasonably return a verdict on an uncharged alternative offence, fairness to the accused may require that the jury be directed as to the availability of that alternative verdict, notwithstanding that neither party has sought that that alternative be left to the jury.[26] In the present case, as we have discussed, the alternative charge of dangerous driving causing serious injury plainly was open on the facts. Fairness to the accused — and, for that matter, the prosecution — required that that alternative be left to the jury.

47 The fact that the jury were satisfied beyond reasonable doubt of the applicant's guilt on the charges of negligently causing serious injury does not dictate the conclusion that the failure to leave the viable alternative verdict did not occasion a substantial miscarriage of justice. As a matter of human nature, and experience, where a jury is contemplating the guilt of an accused person, particularly on a charge that requires an evaluation of the degree by which an accused person's conduct may have departed from a prescribed standard (and where there may be room for some doubt or indecision as to that issue), the jury might be more inclined to give the accused the benefit of a doubt, where the accused person's conduct more comfortably fits within a less serious alternative offence that has been left for its consideration.

48 In *Gilbert*, the High Court was concerned with the question whether the failure of a trial judge to leave manslaughter as an alternative charge of murder resulted in a substantial miscarriage of justice. In addressing that question, Gleeson CJ and Gummow J referred to the dictum of Fullagar J in *Ross*,[27] that:

> A jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them.

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25 *James*, 490 [37], 493 [48].

26 Ibid 488–9 [31]–[32], 490–491 [37]–[38].

27 *Ross v The King* (1922) 30 CLR 246, 254.

49 Gleeson CJ and Gummow J then observed:[28]

> These statements are inconsistent with the notion that an appellate court must assume, on the part of a jury, a mechanistic approach to the task of fact-finding, divorced from the consideration of the consequences. … This is an age of concern for the victims of violent crime, and their relatives. To adapt the words of Fullagar J, a jury may hesitate to acquit, and maybe glad to take a middle course which is available to them.

50 In a similar vein, Callinan J said:[29]

> The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.

51 The record of the trial does not reveal why neither prosecutor nor defence counsel drew the alternative offence to the trial judge's attention. It is surprising that there was no discussion about that alternative before the commencement of final addresses (if not much earlier). Under s 11(a) of the JDA, it was the duty of the prosecutor to inform the judge of the availability of the alternative. The failure of counsel to raise that matter, however, did not absolve the trial judge from leaving the alternative to the jury (albeit that it might be understandable why his Honour failed to do so, given the experience of counsel involved in the trial).

52 As we have mentioned, by virtue of s 16(1) of the JDA, the trial judge must give the jury a direction if he or she 'considers that there are substantial and compelling reasons for doing so even though the direction has not been requested under section 12'. Section 16(1) cannot, however, govern the present situation. Since the judge does not appear to have been aware of the availability of the statutory alternative, there was no occasion for him to consider that there were 'substantial and compelling reasons' for not giving a direction on alternative verdicts. Quite plainly, the judge did not consider whether there were any reasons (whether substantial and compelling or otherwise) for giving or not giving a direction

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28 *Gilbert*, 421.

29 Ibid 441.

concerning the availability of an alternative verdict.

53 The prosecutor should have informed the trial judge of the availability of the alternative charge. In circumstances where neither prosecutor nor defence counsel lived up to the obligations imposed on them by ss 11 and 12 of the JDA, so that the judge was deprived of making the determinations contemplated by ss 14 and 16, it cannot sensibly be contended that justice has not miscarried. Plainly, there has been 'an error or an irregularity in, or in relation to, the trial' which has occasioned 'a substantial miscarriage of justice'.[30]

54 We have little doubt that, had his Honour been apprised of the provisions of s 422A(1A) of the *Crimes Act 1958*, he would have left the alternative of dangerous driving causing serious injury to the jury with respect to each of the charged offences.[31] As was observed in *James* in the pre-JDA era, a trial judge's duty with respect to instruction on alternative verdicts is an aspect of the duty to secure a fair trial for the accused. We must answer the question whether the failure to leave the alternative verdict of dangerous driving causing serious injury has occasioned a substantial miscarriage of justice by making an assessment of what justice to the applicant required in the particular circumstances of this case, taking into account the real issues in the trial and the forensic choices of counsel.

55 In the present case it is far from perspicuous that defence counsel made any deliberate forensic choice 'not to sully the defence case (that the only proper verdict is one of outright acquittal) by an invitation to the jury to consider the accused's guilt of a lesser offence'. We consider that, given the complete failure to address the issue of the available statutory alternative at trial, it cannot be said that defence counsel made any forensic choices which are determinative of the success of this ground of

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30 CPA, s 276(1)(b).

31 See *Bouch*, 517 [136]. In a like vein, Priest JA observed that it 'is difficult to imagine any circumstance where, on a charge of culpable driving causing death under s 318(2)(b), a trial judge could avoid leaving dangerous driving causing death to the jury as an alternative verdict'.

appeal.[32]

56 In our view, had the jury had available the alternative verdict of dangerous driving causing death, it is by no means certain that they would not have chosen to convict the applicant of that offence in preference to negligently causing serious injury, with the consequence that the applicant would have fallen to be sentenced according to a maximum penalty in each case of five years' imprisonment (rather than ten years' imprisonment). To that extent, the applicant was robbed of a real chance of being acquitted of the more serious offence; and of being convicted of, and punished for, a less serious offence. There has accordingly been a substantial miscarriage of justice.

57 Our principal conclusions on this ground may be summarised as follows:

- First, on the facts of this case, the uncharged offence of dangerous driving causing serious injury clearly was an alternative to the charged offence of negligently causing serious injury.

- Secondly, that being so, s 11(a) of the JDA required the prosecutor to inform the trial judge that that the alternative offence was available.

- Thirdly, notwithstanding the failure of the prosecutor (and defence counsel) to raise the alternative charge with the judge, fairness to the applicant required that the judge direct the jury as to the availability of that alternative.

- Fourthly, the jury's conviction of the applicant on the charges of negligently causing serious injury does not mean that the failure to leave the alternative charge to the jury did not constitute a substantial miscarriage of justice.

58 For these reasons, as we announced on 7 October 2019, ground 3 must

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[32] See [39] above.

succeed.

Conviction ground 2: Did the judge's directions 'dilute' the requisite negligence?

59 It is convenient next to consider ground 2, which in essence complains that the trial miscarried because the trial judge did not direct the jury that 'a person acts with criminal negligence only if his or her acts fall so far short of the standard of care a reasonable person would have exercised and involved such a high risk of death or really serious injury that it deserves criminal punishment'.

60 At the outset of the trial, after the prosecutor had opened to the jury and defence counsel had responded, the trial judge gave a brief direction to the jury that a person acts with criminal negligence if his or her acts fall so far short of the standard of care that a reasonable person would have exercised and involved such a high risk of death or really serious injury that it deserves criminal punishment. The next day, having 'decided to briefly revisit the elements of the charge of negligently causing serious injury', the judge directed the jury as follows:

> A person acts with criminal negligence if his act, or her acts, fell so far short of the standard of care a reasonable person would have exercised, … and involved such a high risk of death, or really serious injury, that it deserves criminal punishment.

61 A few days later, the trial judge drew counsel's attention to this Court's decision in *Bouch*. In days following there was discussion as to the ramifications of *Bouch* with respect to a charge of negligently causing serious injury, in the course of which the applicant's counsel submitted that the trial judge should direct the jury that the relevant negligence must be such that it merits criminal punishment. In a brief ruling, his Honour rejected the submission of defence counsel.[33] Prior to final addresses, he told the jury that the directions he had given on criminal negligence on two occasions at the beginning of the trial were 'wrong', and that he would correct those directions in the charge.

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[33] Citing *Bouch*, 481 [5] (Redlich and Weinberg JJA), 518 [139] (fn 123) (Priest JA).

62 Ultimately, the directions in the judge's charge included the following:[34]

> This second element, which is the element in question, in issue, is that the prosecution must prove that [the applicant] breached the duty of care to his passengers, in particular, by being criminally negligent in failing to keep a proper lookout.
>
> A person acts with criminal negligence if his acts involved *a great falling short of the standard of care* which a reasonable person would, not could, have exercised in all the circumstances, and his acts *involved a high risk that death or really serious – or serious injury would follow*. This is an objective test. You must find beyond reasonable doubt two matters before you can find him guilty.
>
> And this assumes, of course, that you have already found that he has failed to keep a proper lookout. …

And also:

> In considering this element, remember that people do not always act perfectly. If it was a perfect world, it would be just that. Even the most careful person can occasionally lose attention or make mistakes. *This offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being seriously hurt*. ...
>
> So, breaches of an expected standard of care, *minor breaches, is not a concern of the criminal law*. *What might establish negligence in a civil case* — who has to pay who for the damage to the vehicle — … *is not sufficient* to establish guilt in a criminal case.
>
> For a person to be guilty of negligently causing serious injury, *more is required*. [The applicant's] conduct *must have been criminally negligent in the way in which I have defined it*. The mere fact that [the applicant] owed a duty of care to the passengers who were seriously injured, does not mean that he was criminally negligent. Obviously not. There must be those other two, further matters that have to be established beyond reasonable doubt.
>
> In particular, you should take care not to use the benefit of hindsight when determining whether or not the prosecution has established beyond reasonable doubt that [the applicant] was criminally negligent. It is all very well to look back from what you have seen and say, 'Well, I'll draw that conclusion'. Beware of the benefit of hindsight.

63 Thus, the judge directed the jury in clear terms that:

- first, the offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being seriously hurt;
- secondly, minor breaches of the standard of care are not the concern of the criminal law;

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[34] Emphasis added.

- thirdly, a breach of the standard of care which might be enough to found a claim for damages in a civil case, is not sufficient to establish guilt in a criminal case;
- fourthly, a person acts with criminal negligence only if his or her acts involve a great falling short of the standard of care which a reasonable person would have exercised in all the circumstances, and involve a high risk that death or serious injury would follow;
- fifthly, 'more is required', in that the applicant must have been criminally negligent in the defined way (that is, the offence is not concerned with minor breaches of the standard of care — even if someone is seriously injured — so that a breach of the standard of care sufficient to found a claim for damages in a civil case is insufficient to found criminal liability, the relevant conduct needing to involve a great falling short of the standard of care which a reasonable person would have exercised in all the circumstances, and to involve a high risk that death or serious injury would follow);
- sixthly, the mere fact that the applicant owed a duty of care to the passengers who were seriously injured does not mean that he was criminally negligent; and
- seventhly, the jury should not assess the alleged breach of the standard of care with the benefit of hindsight.

64 *Bouch* was a case in which a jury had convicted the appellant of culpable driving causing death through gross negligence and of negligently causing serious injury (by driving).[35] One of the grounds of appeal contended that a substantial miscarriage of justice occurred as a result of the trial judge's direction that in order to find the appellant guilty of culpable driving and negligently causing serious injury it was necessary that the jury be satisfied that the appellant's conduct merited criminal

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35 *Crimes Act 1958*, s 318(2)(b).

punishment. *Bouch* was decided against the backdrop of the High Court having held in *King* that, when directing juries as to the elements of dangerous driving causing death,[36] trial judges should no longer use the expression 'merits criminal punishment' (or some similar formulation). Priest JA held that, when directing on the elements of culpable driving causing death, as a result of *King*, 'a trial judge should avoid introducing any requirement that the impugned conduct must merit criminal punishment',[37] and that[38]

> for the purposes of culpable driving causing death by gross negligence, a person drives negligently if he or she unjustifiably and to a gross degree fails to observe the standard of care which a reasonable person would have observed in all of the circumstances. The jury should be told that 'gross' is an ordinary English word which should be given its ordinary meaning, but that it conveys the notion that the required negligence must be of a high order, involving a great falling short of the standard of care which a reasonable person would have exercised in all of the circumstances, and involving a high risk that death or serious injury would follow from the relevant conduct. It would usually also be helpful to explain that, since the required negligence must be of a high order, and must involve a high risk of death or serious injury, the kind of negligence which might be constituted by momentary inattention or a minor error of judgment, or which might found a simple civil claim for monetary compensation, generally would not be sufficient to support a finding of gross negligence. And it will be necessary, of course, to point to those matters which might go to constitute negligence of the high order necessary for conviction.

65 In a footnote to the passage immediately above, Priest JA said: 'Appropriately modified directions will also be suitable on a charge of negligently causing serious injury'. Moreover, Redlich and Weinberg JJA observed:[39]

> We agree with Priest JA that, largely as a result of several observations by the members of the High Court in *King*, but also for separate reasons, trial judges should in future no longer direct juries that the more serious offence of [culpable driving causing death], contrary to s 318(2)(b) of the Crimes Act, requires them to be satisfied that the driving in question 'merits criminal punishment'. The same applies to the lesser offence of [negligently causing serious injury].[40]

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36 *Crimes Act 1958*, s 319(1).

37 *Bouch*, 518 [138].

38 Ibid 518 [139].

39 Ibid 481 [5]–[6].

40 Although their Honours referred to 'negligent driving causing serious injury' (see 481 [3]), it is plain that they had in mind the offence of negligently causing serious injury under s 24 of

> Justice Priest has, in his reasons for judgment, traced the history of the expression 'merits criminal punishment' back as far as *Nydam v The Queen*.[41] In fact, as the decision in *King* shows, judges in England have used language of that kind when directing juries for far longer than that.

66 Following these observations, Redlich and Weinberg JJA discussed a number of the English authorities,[42] and said:[43]

> As Priest JA has demonstrated, in *King* both Heydon and Bell JJ deprecated the use of expressions such as 'merited criminal punishment' in relation to [culpable driving causing death]. Justice Heydon criticised the use of that expression as being 'risky'. In his Honour's view it could lead to a series of like cases being treated differently, and different cases being treated alike.[44]
>
> Those who agreed in the joint judgment in *King*[45] also questioned, by way of dicta, the desirability of directing juries dealing with [culpable driving causing death] that they must be satisfied that the driving 'merited criminal punishment'.[46]
>
> By instructing the jury in the present case that they had to be satisfied that the appellant's driving 'merited criminal punishment', the trial judge, understandably, misdirected them. Nonetheless, we agree with Priest JA that this misdirection did not give rise to a substantial miscarriage of justice. For one thing, as we have said, it created an additional bar to conviction. For another, we consider that a conviction for [culpable driving causing death] was inevitable …

67 Additionally, Whelan and Ferguson JJA agreed that when directing juries on the offence of culpable driving causing death

> there should be no reference to meriting criminal punishment. That is, the judge should direct the jury that they are required to find that the driving of

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the *Crimes Act 1958*, involving a motor vehicle.

41 *Nydam v The Queen* [1977] VR 430 at 444-445.

42 *Bouch*, 481– 2 [7]–[14].

43 Ibid 482–3 [15]–[17] (citations as in original).

44 To be fair, the same could be said of many 'open textured' rules that regularly confront judges and juries. Consider the debate surrounding the meaning of the term 'dishonestly' for the purposes of the *Theft Act 1968* (UK). In *R v Feely* [1973] QB 530, it was held that this term was used in its ordinary sense, and required the jury to determine whether, according to the 'current standards of ordinary, decent people', the conduct of the accused should be stigmatised as such. See also *R v Ghosh* [1982] QB 1053, and David Lusty, 'The meaning of dishonesty in Australia: rejection and resurrection of the discredited *Ghosh* test' (2012) 36 Crim LJ 282.

45 Chief Justice French, Crennan and Kiefel JJ.

46 The expression 'merits criminal punishment', in this context, has some of the hallmarks of what Professor Julius Stone described as a 'category of illusory reference'. See generally his discussion of 'circularity' in seemingly logical reasoning in *Legal System and Lawyers' Reasonings*, Ch 7 (Maitland Publications, 1964).

> the accused involved a great falling short of the standard of care which a reasonable person would have exercised in the circumstances and involved a high risk that death or serious injury would follow. A reference to and comparison with civil negligence is likely to be helpful to the jury.[47]

68 In *Shields*,[48] the Full Court expressed the view that the degree of negligence for the forerunner of the present offence of negligently causing serious injury — that is, negligently causing grievous bodily injury under s 26 of the (then) *Crimes Act 1958* — was 'the same degree as that required to support a charge of manslaughter'.[49] The Court said:[50]

> Having regard to the view which we have formed of the effect of s 26, we consider that we should not part with this case without giving further guidance to trial judges as to how juries should be directed concerning negligence where an offence against that section is charged. If the count under s 26 is not joined with a count under s 318 [culpable driving causing death], no difficulty arises: the direction should be based upon that which would be appropriate to a charge of manslaughter, the usual manslaughter direction being modified so as to reflect the circumstance that s 26 is concerned with grievous bodily injury. Accordingly the jury may be directed that the act or omission must have taken place in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised, and which involved such a high risk that grievous bodily injury would follow, *that the act or omission merits punishment under the criminal law*: cf *Nydam v The Queen* [1977] VR 430 at 444-445. A comparison with civil negligence will also be helpful.

69 In light of *King* and *Bouch*, however, it can no longer be accepted that, on a charge of negligently causing serious injury under s 24 of the *Crimes Act 1958*, the jury must be directed that the act or omission founding the charge must have taken place in circumstances which involved such a great falling short of the standard of care which a reasonable person would have exercised that the act or omission merits criminal punishment.

70 We consider that, consistently with the current state of the authorities, on a charge of negligently causing serious injury, the judge must direct the jury that the required negligence must be of a high order, involving a great falling short of the

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47 *Bouch*, 495 [73].

48 *R v Shields* [1981] VR 717 (Young CJ, Anderson and Brooking JJ).

49 Ibid 724.

50 Ibid 723 (emphasis added).

standard of care which a reasonable person would have exercised in all of the circumstances, and a high risk that death or serious injury would result from the relevant conduct. The judge should also explain that, since the required negligence must be of a high order, and must involve a high risk of death or serious injury, the kind of negligence which might be constituted by momentary inattention or a minor error of judgment, or which might found a simple civil claim for damages, generally would be insufficient to establish the necessary high degree. It will also be necessary for the judge to point to those matters which might constitute a high order of negligence necessary to support a conviction. The judge should bring home to the jury that the offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being hurt. While minor breaches of the standard of care might establish negligence in a civil case, such minor breaches are not sufficient to establish guilt in a criminal case. More is required, in the sense that the conduct must involve a great falling short of the standard of care, and a high risk that death or serious injury would result. Even a substantial departure from the standard of care may not constitute such a great departure sufficient to constitute criminal negligence.

71 In our view, the impugned directions in this case — the essence of which we distilled above[51] — were in conformity with authority.

72 That said, we acknowledge that, taken in isolation, the judge's directions that 'minor breaches' of an expected standard of care 'is not sufficient to establish guilt in a criminal case', 'more [being] required', could give rise to the mistaken impression that a non-minor breach of the requisite duty of care is sufficient to establish guilt in a criminal case. Quite clearly, there are many cases in which a person might breach his or her duty of care in more than a 'minor' respect — so as to render that defendant liable for damages in civil law — in circumstances where the departure from the duty of care could not, on any view, be characterised as criminal negligence; that is, conduct that constituted a gross departure from the standard of

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[51] See [62]–[63] above.

care expected of that person. In the future, therefore, any directions to be given to a jury in similar cases must make plain that quite commonly there could be a departure by a motorist from the duty of care which could not be characterised as 'minor' — indeed, which could be quite substantial — but which nevertheless falls short of constituting such a great departure from the standard of care as to constitute gross negligence.

73 Error has not been demonstrated. Ground 2 cannot be upheld.

Conviction ground 4: Did a miscarriage of justice result from the bus driver's comment after the view that 'the Montague Street Bridge is well known in the bus industry'?

74 A view was conducted on 11 October 2018.[52]

75 As is required, the judge afterwards summarised what had occurred on the view.[53] After some further discussion, the judge raised a matter that apparently had concerned him. He then elicited some information from his tipstaff. The relevant passage of transcript is as follows:[54]

> HIS HONOUR: ... There's a matter that's been troubling me that … my Tipstaff, has drawn to my attention that occurred after the view, and as I understand it, before the bus containing the jury set off, involving the conversation with – where the bus driver with the jury's bus said something. Mr [Tipstaff], would you … just reiterate what it was that you observed and how it came about.
>
> TIPSTAFF: Yes Your Honour. [A]s the bus came to, um, Montague Street from Murray, and was about to turn right, the, um, statement was made.
>
> HIS HONOUR: So this is after the view?
>
> TIPSTAFF: After the view and we're on the way back, the statement was made 'Turn right, turn left, down go near the bridge'. The bus driver replied.
>
> HIS HONOUR: Who said that?
>
> TIPSTAFF: It came from near the front.
>
> HIS HONOUR: One of the jurors.
>
> TIPSTAFF: I think it was one of the jurors, I'm not sure. It could have even

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52 See *Evidence Act 2008*, ss 53 and 54.

53 See *Ha v The Queen* (2014) 44 VR 319 ('*Ha*').

54 Emphasis added.

been [a jury keeper].

JURY KEEPER: I think it might have been myself.

HIS HONOUR: Thank you. Another one of the jury keepers, yes.

TIPSTAFF: It was another jury keeper. *It was said quietly, not too many of the other jurors would have heard it but one did, but the bus driver replied, 'The Montague Street bridge is well known in the bus industry'. I looked at the girl sitting immediately behind [a jury keeper], who heard what was said. I don't believe that anyone else would have heard it.* … [W]e didn't say anything, we didn't draw attention to it, there was no reaction from anyone else in the bus.

HIS HONOUR: Yes, thank you, Mr [Tipstaff]. There is nothing wrong that [the jury keeper] has done, it's just … the response that the bus driver has made. I'll leave counsel to consider the situation.

COUNSEL: Thank you, Your Honour.

HIS HONOUR: It's something that should not have occurred from the bus driver, it's something that he volunteered that could not have been stopped by either of the jury keepers but it's something that has happened which I think counsel is entitled to be acquainted with. I don't intend to do anything about it today. If counsel wish to address me upon it tomorrow after having an opportunity to reflect then I will hear from counsel then.

76 The following day, the applicant's counsel made an application for the jury to be discharged. In the course of discussion, the prosecutor raised a concern that the bus driver had referred to the bridge being well known within the bus industry generally, rather than in Melbourne specifically (the applicant being based in Ballarat), although ultimately he opposed the application for the jury to be discharged.

77 Refusing the application, his Honour said (among other things):

I am of the view plainly here that it is entirely speculative as to whether the juror closest to the driver overheard the driver's remark and even if she did thought anything of it and even if she did think something of it, that she bothered to disseminate such an innocuous remark that is one that would suggest that other professional … bus drivers, truck drivers and the like, know of this bridge, know of this notorious bridge in the Melbourne area, whereas, [the applicant] is a bus driver from Ballarat where there are, within the Ballarat area and immediate region, no such bridges of any concern for his professional services as a bus driver. ...

...

I am further of the view that my analogy this morning, that this would be but a pinprick to an elephant, was correct. Perhaps a little extreme but it drives home the point. There is no prospect in my view that the accused has suffered in any way or the prospect of the trial being unfair. Nor do I consider it to be anything remotely approaching the need for a discharge of the jury there being a high degree of need.

78 In this Court, counsel for the applicant submitted that while considerable evidence had been called regarding the notoriety of the Montague Street Bridge in Melbourne, the generality of the bus driver's comment was apt to lead the jury to believe that, as a member of the bus industry generally, the applicant would have (or should have) been aware of the low height of the Montague Street Bridge. This was contrary to the defence case that, as a resident of Ballarat, he was not aware of the bridge, and increased the likelihood of the jury concluding that the applicant was criminally negligent in driving into the bridge. Further, there was evidence from Nicholas Alexandrou, who worked at a car dealership on the corner of Montague Street and Normanby Road, that he had witnessed 'a lot of accidents in that area under the bridge' involving trucks, but had not seen another bus strike the bridge. So much, it was submitted, further heightened the risk of the jury reasoning in an impermissible way. As a result, there has been a substantial miscarriage of justice.

79 Counsel for the respondent submitted that the comment by the bus driver did not give rise to a substantial miscarriage of justice. It was submitted that the comment, if overheard, was, if anything, useful to the applicant's defence. His case was that the bridge was indeed notoriously dangerous; that VicRoads was at fault for not properly warning of the bridge and mitigating that risk; and that his employer was at fault for not warning him — a stranger to the area — of the danger and how to avoid it. No matter what others knew, it was accepted that the applicant was unfamiliar with the area and the bridge. In any event, any possible prejudice was ameliorated by directions given by the judge at the end of the day that the view was held, including:

> … And so there's always those sorts of dangers that people may say something in your presence or you may overhear something that suggests a view of the evidence.
>
> [O]ur system of justice requires you to determine the facts as you find them based on the evidence presented in this trial and from no other source. ...
>
> So ladies and gentlemen, it's not as if we're all hermits. It's not as if we're all to be stuck in some sort of (indistinct) particular view, a glass bottle whilst all of this is going on. You will be exposed to potentially, through newspaper articles or from what other sources, someone who might say something which is neither here nor there. You act as judges. You act upon the evidence and

> materials set before you, allocating the importance that you think that evidence might have in your mind or not. That's your job as judges of the facts.
>
> …
>
> All I'm saying is I warn you again because when we go on a view there's that greater risk that that exposure to casual comments can occur. You don't take anything from it. You put it aside. …

80 In our view, there is a substantial risk that, had the bus driver's remark been heard by a juror, he or she would have repeated it to other members of the jury. That having occurred, we consider that there is a not insubstantial risk that some of the jury would have interpreted the remark as an assertion that the applicant — as a member of the bus industry — should have been aware of the hazard presented by the Montague Street Bridge.

81 Notwithstanding that this is so, however, we would not uphold this ground. We consider that, had a juror (or jurors) been aware of the bus driver's comment, the directions given by the trial judge were sufficient to negate any unfair prejudice resulting to the applicant from the bus driver's comment.

82 Despite our conclusions on this ground, however, it must be emphasised that in any future cases in which it is necessary that a jury be transported to a relevant scene on a view, it will be important that those responsible for the jury's transportation — including any driver — fully understand that there is a proscription against discussing anything relating to the case in the presence of the jury.

83 Ground 4 cannot succeed.

Conviction ground 5: Did a miscarriage of justice result from the informant being the 'shower' on the view?

84 Although the drafting of ground 5 might not be thought to be entirely apt to raise the issue, it appears that the gravamen of the complaint advanced under cover of this ground is that the appointment of the informant as 'shower' on the view engenders an apprehension of bias (any claim of actual bias being eschewed).

85 Over the objection of defence counsel, the informant, Senior Constable Stephen Charlton, was sworn as a 'shower' for the purposes of the view conducted on 11 October 2018.

86 Shortly after the view was conducted, the judge provided the following summary (the content of which was not challenged by either counsel):

> A view was conducted this morning with the jury of 13 attending in bus accompanied by the two jury keepers at [Munro] Street. At that street, counsel and instructing solicitors for both the prosecution and defence attended together with myself and my associate.
>
> The view commenced with a change in the plan outlined yesterday that instead of having two separate walks with the first walk identifying the situation as it was in February 2016 to combining the appearance of the signage and other objects along Montague Street current as well as back in 2016.
>
> The view commenced with the jury in company with those who I've just mentioned walking in a northerly or generally northerly direction to the top of the [sic] Montague Street near the labyrinth of the Westgate Freeway interchange and commenced at a point where the Montague Street bridge was not visible because of the curvature of the road at that point.
>
> The jury were directed to particular sites where views were conducted along the lines indicated both in relation to current signage and 2006 signage as set out in the photographs which became Exhibit 1 and 2; Exhibit 1 being current signage and Exhibit 2 being signage back in February 2016 with the informant, Senior Constable Charlton acting as pointer.
>
> After each area or after each stop, Mr Charlton pointed out various signage and other matters to the jury and we, that is counsel, myself and others, left the jury in the attendance of the two jury keepers for them to discuss as they wished and view as they wished that particular area moving generally in a southerly direction across Monroe Street, then Normanby Street and coming ultimately to the Montague Street bridge.
>
> I there indicated to the forelady and the members of the jury that we would continue on some distance past the Montague Street bridge, on the same side, namely the eastern or generally eastern side of the footpath back, retracing our steps, and with the jury then instructed that it was for them to choose when they wished to stop on the way back, heading north, as and when they required, to further examine the scene.
>
> Eventually we turned – the jury after a number of stops, returned to the initial start point, or slightly beyond that initial start point and then headed in a southerly direction, again stopping as they chose with us following. That exercise went down to the area close to the Montague Street Bridge but the jury did not go beyond the bridge itself.
>
> The jury indicated to me that they were satisfied with what they had observed, and then the jury walked ahead of us, accompanied by the jury keepers, back to the Monroe Street where the bus that escorted the jury – drove the jury there was parked. From there we departed back. The exercise

> took from start to finish from about 11.30 to some short time before one o'clock.
>
> During the course of those walks a number of communications were made between myself and the forelady, and additional items were pointed out. Those specifics will be detailed during the course of tomorrow.

87 Prior to the view, defence counsel had taken issue with the informant being the shower, noting that in counsel's experience a member of the court staff usually performed that function in order to 'maintain the integrity of the process of the trial'. The judge said that his own experience, however, was that he had 'never had a situation where … a police officer has not been utilised as a pointer'.

88 In this Court, counsel for the applicant submitted that the Court's endorsement of the informant as the 'shower', over objection by trial counsel, gave rise to a perception of bias. It also 'bolstered the informant's authority in the eyes of the jury', who had the opportunity to interact directly with him in a less formal setting than in court. Given the informant had brought the charges against the applicant and conducted the investigation, counsel submitted in writing, 'there is a real risk that the jury may have been more partial to the prosecution case as a result'. At the very least, a fair-minded lay observer might reasonably apprehend that the judge or jury might not bring an impartial mind to the resolution of the questions they were required to decide.

89 Counsel for the respondent submitted that in order to establish error the applicant must establish that the utilisation of the informant as shower was improper or has resulted in some unfairness. In circumstances in which no misconduct is alleged on the part of the informant, it is difficult to see how using him as the shower could have had any impact on the trial. The respondent's counsel submitted that it was reasonable to utilise the informant, properly sworn, to point to the agreed list of items, as the investigator and a person familiar with the scene. His credibility or reliability was not in issue. The signs and items he was to point out were physical objects, relatable to the photographs, which did not change during the trial. Even if this Court held it to be preferable that 'some neutral person' be the shower, absent

some misconduct or other particular reason relatable to the trial itself, so much cannot amount to a substantial miscarriage of justice.

90 As we remarked in the course of oral argument, it is the common experience of the members of this Court that, in order to maintain an atmosphere of neutrality, a member of court staff is ordinarily appointed as the 'shower' for a view. Often, the member of court staff who is to be the shower, is taken in advance of the view to the site where the view is to take place so as to familiarise himself or herself with its relevant features. On such a 'dry run', it is common for the police informant or other investigator to accompany the member of staff to assist him or her to become conversant with any relevant features. That practice should continue.

91 In *Ha*,[55] Priest JA observed that there is 'much to be said for the guidance to be found in the New South Wales Bench Book'. Given the issues raised by the present ground, however, we consider that it is necessary to add a qualification to the support otherwise given to the NSW practice. As reflected by the relevant Bench Book, the NSW practice apparently contemplates that it is normal to nominate the officer in charge of an investigation as shower for the purposes of the view.[56] In our opinion, however, it would be a wholly exceptional case in which it was appropriate for the informant or other investigator to fulfil that role.

92 There are at least three reasons why ordinarily the informant (or other investigator) should not act as a shower. First, a shower is appointed by the Court. Ostensibly, the shower is thereby invested to some extent with the Court's authority, in circumstances in which the informant has played an important role in investigating the case, and is a prosecution witness in the trial. Particularly in cases where, for example, there is a live issue in the trial about the adequacy or methodology of an investigation, or about the truthfulness, credibility or reliability of investigators, it will be crucial to ensure that the shower is someone who can be

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55 *Ha*, 329 [33].

56 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 667 [4–340] (*Views and Demonstrations*).

seen to be disinterested and non-partisan. Secondly, while in the present case there is no suggestion that the informant made any inappropriate communication with the jury, there is always a real risk that that can occur and not be detected. Thirdly, the informant's participation as shower might in some circumstances legitimately give rise to a real apprehension by the accused person and others that the jury might be affected in its view of the relevant scene — and in particular, in what it observed at the view — by reason of the informant's involvement as the shower.

93 We are not persuaded, however, that justice miscarried in the instant case as a result of the informant having fulfilled the role as shower. We perceive no attack to have been made on Senior Constable Charlton's truthfulness, credibility or reliability in his cross-examination by defence counsel; and, except in relatively minor respects, no criticism was directed at his investigation by defence counsel in cross-examination or final address. Moreover, after the view, no complaint about, or criticism of, Senior Constable Charlton's conduct during the view was made to the trial judge (as might have been expected if counsel considered that his conduct had been wanting). It was not suggested, for example, that Senior Constable Charlton displayed any partiality or bias, or that his conduct in pointing out any relevant features was in any way tendentious. Further, in the circumstances of this case, we cannot see that the appointment of the informant as shower might have caused a fair-minded lay observer reasonably to apprehend that the trial judge might not bring an impartial mind to the resolution of any question that he was required to decide, or could give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the jury might not have discharged its task impartially.[57]

94 Ground 5 cannot be upheld.

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57 *Webb and Hay v The Queen* (1994) 181 CLR 41, 52–3 (Mason CJ and McHugh).

Conviction ground 1: Is the verdict unsafe and unsatisfactory?

95 Finally, we would not uphold the contention that the verdict is unsafe and unsatisfactory.

96 In the written case, counsel for the applicant submitted that although 'it was open to the jury to conclude that the applicant had failed to keep a proper lookout, it was not open to conclude that such conduct amounted to *criminal* negligence'. We disagree.

The applicant's submissions

97 Counsel for the applicant relied on a number of features which, she submitted, should have led the jury to have had a reasonable doubt on the issue of criminal negligence. They included the following:

98 First, the applicant had never been involved in a motor vehicle accident, and his employer had never received a complaint regarding his driving.

99 Second, the applicant's driving was not attended by any of the features which are common to drivers who are guilty of this offence: he was properly licensed; was not speeding or driving erratically; was not affected by drugs or alcohol; was well-rested; and was not distracted by using a mobile phone, or, apparently, by talking to passengers.

100 Third, the evidence revealed that the Montague Street Bridge is the lowest bridge on the arterial road system in Victoria, and is the 'most struck' structure in Victoria (having been struck at least 86 times between 2009 and 2015). Nicholas Alexandrou, a witness who worked in the near vicinity, in cross-examination said that in the period of seven years leading up to February 2016 he had seen 'at least a hundred or more' collisions involving the bridge. Brian Westley, VicRoads' Regional Director for the Northern Region, gave evidence that the bridge is so notorious in Melbourne that there is a 'Facebook' page dedicated to it, together with a website counting the number of times the bridge has been struck.

101 Fourth, Mr Westley's evidence that 'around 2,000 commercial vehicles per day' travelled along Montague Street in both directions each day in 2017 sheds no real light on the degree of negligence exhibited by the applicant, since there is no information as to how many of those 2000 vehicles involved drivers from outside Melbourne who had never driven in the area and who were not familiar with the bridge.

102 Fifth, the applicant was from Ballarat; was not familiar with the bridge; and had never before driven in the area.

103 Sixth, the applicant had been given no training with respect to route mapping.

104 Seventh, the applicant was not provided with the job instruction sheet by his employer until the morning of the collision. Further, he was not warned by his employer of the danger presented by the bridge, despite another employee of the same company having struck the bridge in 2006 (prior to the applicant being employed).

105 Eighth, although the evidence revealed that three of the 14 passengers saw the bridge immediately prior to impact, the applicant was seated two steps lower than the passengers, and, so the applicant told police, the sun visors were down.

106 Ninth, the applicant suffered serious injuries in the collision and had no recollection of actually striking the bridge. He told police that he was confused prior to the collision.

107 Tenth, Mr Westley, a VicRoads expert, in cross-examination agreed that some might have an expectation that since Montague Street came 'straight off' a 'major freeway', it is 'a road for major traffic'. (Mr Westley, it should be noted, said that although 'someone might suppose that's an expectation [he did not] share that view'.)

108 Eleventh, the applicant faced significant 'visual clutter', consisting of a multitude of signs (only some of which related to the bridge), trees, traffic lights, side

streets, lanes increasing and then decreasing, many other moving vehicles, and parked cars, so that there was an 'overload of the senses'. Immediately after the exit from the West Gate freeway, there was a tight curve less than 300 metres from the bridge, at which point three lanes became five (including two right-hand-turn lanes, and a left-hand lane towards parking). Concentrating on ensuring he did not end up on the wrong road may well have resulted in the applicant having 'tunnel vision' (and a corresponding failure to observe the relevant signage). Counsel pointed out that the road has since been split at that point and significant alterations have been made to the signage.

109 Twelfth, with respect to the relevant signs, the bus was travelling in the right-hand lane. Before the bridge, all but two signs were on the left-hand-side of the road. Of those two, the first sign was on the median strip in the centre of the road at a point where there were more than two lanes; and the very last sign was actually on the right-hand-side of the road, beyond the traffic travelling in the other direction, on a power pole behind a tree. (The evidence was that a VicRoads road traffic engineer, Robert Morgan, subsequently recommended that all of the signs be mounted above the road so as to be more visible to drivers.)

110 Thirteenth, there was some evidence that, on the day of the collision, tree branches were covering the sign 72 metres from the bridge.[58]

111 Fourteenth, following the collision, a VicRoads road traffic engineer, Robert Morgan, identified a multitude of deficiencies in the relevant signage, including that:

- there were too many signs in single locations;
- some of the signs served dual purposes, which could be confusing;
- the signs were competing for attention with trees, poles and advertising, and the many vehicles on the road;
- most of the signs were side mounted on the outside of the road (Mr

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[58] See fn 9 above.

Morgan recommending that 'master signs' be installed above drivers); and

- the configuration of the first set of signs was potentially confusing, 'not suitable' (due to their text size, the number of characters and the width of the board) and contained too many messages, creating an overload of the senses.

112 Fifteenth, as a result of the deficiencies identified by Mr Morgan, considerable improvements were made following this collision, including that:

- the dual purpose of the first sign was remedied, the new sign erected on the left-hand-side of the road stating, '3.0 m HEIGHT, LOW BRIDGE AHEAD, HIGH VEHICLES DETOUR';
- the order of the messages conveyed by the next sign was reversed, with the '3.0 m HEIGHT' message being moved to the top of the sign;
- a new sign was installed on the right-hand-side of the road, approximately level with the previously mentioned new sign, conveying that same message (without any reference to Station Pier, in words or pictures);
- the height of the following sign was lowered significantly, and its depth increased — to ensure people in all types of vehicles have a clear line of sight — and the words 'TRUCK DETOUR' were replaced with 'HIGH VEHICLES DETOUR';
- the next sign was moved further back, and the order of messages conveyed by the sign was changed, with the '3.0 m' message being moved to the top of the sign, and a reference to the bridge also being added;
- the last sign before the bridge, which had been located on a power pole behind a tree on the right-hand-side of the road, was replaced with a new sign placed in front of the tree to make it more visible to drivers;
- the text of the 'LOW CLEARANCE' sign on the bridge itself was changed, and a 'LOW CLEARANCE' warning was added in red to the chevron on the bridge; and

- a gantry was installed on the approach to the bridge, comprising hanging plastic paddles heavy enough to make a thud (warning a driver that their vehicle is too high to fit under the upcoming bridge without damaging the vehicle).

113 Furthermore, Brian Westley, VicRoads' Regional Director for the Northern Region, gave evidence that, although 'the bridge strikes keep happening' since the improvements, they occur at 'a lesser rate'.

114 Finally, counsel submitted that the charges of which the applicant was convicted are the equivalent of culpable driving, save that the victims were seriously injured rather than killed. They were based on a failure to observe warning signs. The difficulty in this case, however, is that at least some of the signs facing the applicant were deficient, and his view of some signs was impeded. Hence, so it was submitted, whilst the applicant's conduct may well have amounted to 'civil negligence', it was not open to the jury to conclude that he was criminally negligent.

The respondent's submissions

115 Counsel for the respondent contended that the jury's conclusion that the applicant's lack of attention amounted to criminal negligence clearly was the only reasonable assessment of the extent of the applicant's failure to take reasonable care, in circumstances where the applicant, through his counsel, conceded that it was open to the jury to find that he did not keep a proper lookout.

116 The respondent's counsel submitted that the jury were told repeatedly of the many impacts with the bridge over the years. Further, the applicant's counsel also raised issues about the extent of training and instruction from the applicant's employer as to route planning, and as to the employer's failure to inform the applicant that a bus owned by the parent company had hit the same bridge in 2006. At trial, the jury had the benefit of defence counsel's arguments that the changes to the signs after the collision, and the placement of a gantry with paddles, meant that

the signs in place at the time, and the lack of a gantry, meant that VicRoads was at fault for not dealing with the risk presented by the low bridge.

117 Counsel for the respondent submitted that the bridge presented an obvious hazard to road users, about which any reasonable road user — including the applicant — would need to be mindful. Far from 'lurking', the bridge was large, approached by a straight and effectively level multi-lane road, clearly visible, and was well signed-posted. It was submitted that the risk it presented was obvious, and was highlighted by the various warning signs and lights. The essential difficulty the applicant faced at trial — and now — was that he did not see any of the signs, nor the bridge itself. Counsel submitted that it was not a question of seeing the signs and not understanding them, nor seeing the bridge and not appreciating that it was too low for his bus to pass under, but rather not seeing any of the warnings or the hazard itself. The distance from the bridge, and the number of signs intervening, demonstrated that the applicant's failure to observe continued over a significant period of time and distance. Thus, so counsel submitted, whether the signs could have been simpler or clearer was not to the point.

118 Further, the respondent's counsel submitted, the fact that over the years other drivers have also hit the bridge simply reflects the fact that those drivers also failed to take reasonable care. Those other incidents do not, however, dictate a finding that the applicant was not criminally negligent. As the prosecutor at trial noted, the number of bridge strikes needed to be seen in the context of the high volume of traffic on Montague Street (according to Mr Westley's evidence around 25,000 vehicles per day in 2007, and around 27,000 per day in 2017, about 2,000 of those being commercial vehicles). The negligence which founded the charge was the applicant's failure to keep a proper lookout for about a minute, over about 300 metres of road. The jury must have rejected the applicant's contentions that the nature of the bridge, its history, and the nature and extent of the signs, meant that he was not criminally negligent.

119 It was well open to the jury to find that his failure to keep a proper lookout —

particularly when he was driving a large vehicle with 14 passengers on board — involved a great falling short of the standard of care which a reasonable person would have exercised in all the circumstances, and that his failing involved a high risk that death or serious injury would follow.

Analysis

120 In our opinion, it was open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty of negligently causing serious injury to the six passengers.

121 Section 276(1)(a) of the CPA provides that this Court must allow an appeal against conviction if the jury's verdict 'is unreasonable or cannot be supported having regard to the evidence'. The test to be applied under that limb is as formulated by Mason CJ, Deane, Dawson and Toohey JJ in *M*.[59] Hence, 'the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.[60] The Court must make its own independent assessment of whether, on the evidence, there is a reasonable doubt as to guilt, giving full weight to the jury's advantage in seeing and hearing the witnesses.[61] Generally, a reasonable doubt about guilt experienced by the appellate court is one that the jury should also have experienced.[62]

122 Among other duties, the applicant had a duty to carry his 14 passengers safely.[63] Realistically, counsel for the applicant conceded that it was open to the jury

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59 *M v The Queen* (1994) 181 CLR 487 ('*M*').

60 Ibid 493.

61 Ibid 492–4; *R v Baden-Clay* (2016) 258 CLR 308, 329–30 [65]–[66] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

62 *M*, 494.

63 Section 17(1) of the *Bus Safety Act 2009* provides that a 'bus safety worker' involved in 'bus safety work' — which includes 'driving a bus' — 'must take reasonable measures to ensure the safety of persons who may be affected by the acts or omissions of the bus safety worker'. See also s 14, which sets out the 'concept of ensuring safety'.

in all of the circumstances to conclude that the applicant failed to keep a proper lookout. Thus, as we followed it, there was no dispute that the applicant had failed to observe the standard of care that a reasonable bus driver — carrying passengers — would have observed in all of the circumstances. Counsel's central contention was narrow (but important): although it was open to conclude that the applicant's conduct in failure to keep a proper lookout was negligent, it was not open to conclude that such conduct amounted to criminal negligence. That is, counsel argued that the jury could not have concluded on the evidence that the applicant's conduct involved a great falling short of the standard of care which a reasonable bus driver would have exercised in all the circumstances, and involved a high risk that death or serious injury would follow from it.

123 The evidence established that the applicant knew that the height of the bus was 3.8 metres. Furthermore, the evidence was undeniable that the applicant encountered the first sign of the danger ahead — that the bridge was only three metres in height — some 293 metres before the point of collision. Although he might be forgiven for failing to observe, or to appreciate the ramifications of that first sign, it is difficult to comprehend how he failed — in the minute or so he travelled from the first sign to the point of impact — to observe or adhere to the several warning signs leading up to the bridge and upon the bridge itself, or to have seen the bridge and appreciated that his bus might not pass freely beneath it. We consider that, given that he was unfamiliar with the area, and that he had a duty to carry his passengers safely to their destination, the applicant should have planned the intended route with particular care, and to have been particularly alert to make himself aware of his surroundings.

124 A combination of these factors justified the jury's conclusion that the applicant was criminally negligent.

125 The first ground cannot be upheld.

Conviction ground 6: An accumulation of errors?

126 In light of the conclusions on ground 3, it is unnecessary to consider this ground.

Disposition of the conviction appeal

127 As we have said, the application for leave to appeal against conviction will be granted on ground 3; the appeal allowed; and the convictions and sentences imposed in the County Court will be set aside.

128 The setting aside of the convictions and sentences as a result of the upholding of ground 3 would ordinarily require this Court to order a new trial. Section 277(1)(c) of the CPA, however, gives this Court power to enter a judgment of conviction for an alternative offence — in this case, dangerous driving causing serious injury — if the Court is satisfied that the jury 'must have been satisfied of the facts that prove [that alternative offence]'.

129 In the present case, the applicant's position was that if this Court upheld ground 3 and set aside the applicant's convictions and sentences then, rather than ordering a new trial, this Court should convict the applicant of six charges of dangerous driving causing serious injury and then impose sentence in respect of those charges. The taking of such a course in the circumstances of the present case, however, required the concurrence of the Crown. The concurrence of the Crown was required because, notwithstanding the upholding of ground 3, having refused leave to appeal on ground 1, there is no basis upon which this Court might enter a judgment of acquittal on the charges of negligently causing serious injury.

130 The Crown's initial position was that the upholding of ground 3 meant that, after setting aside the original convictions and sentences, there should be a new trial in respect of the six original charges of negligently causing serious injury, where the six alternative offences of dangerous driving causing serious injury were also to be left to the jury. After further consideration, however, the Crown agreed that, 'in the

particular circumstances of this case', it was appropriate for this Court to substitute verdicts of dangerous driving causing serious injury pursuant to s 277(1)(c) of the CPA, and then to sentence the applicant for those offences. This was an entirely commendable approach on the part of the Crown.

Imposing sentence for six counts of dangerous driving causing serious injury: preliminary matters

131 It is necessary to refer to two preliminary matters considering the sentence now to be imposed on the applicant. The following preliminary observations should be made.

132 First, as we have already noted, the judge sentenced the applicant to a total effective sentence of five years and three months' imprisonment, with a non-parole period of two years and six months' imprisonment, on six counts of negligently causing serious injury. On charge 1, the applicant was sentenced to two years and nine months; and on each of charges 2 to 6, he was sentenced to three years. Section 277(1)(c) provides that in imposing sentence for an alternative offence to that which an appellant had previously been convicted, this Court must impose a sentence that is no more severe than the sentence that was originally imposed.

133 Secondly, the maximum term of imprisonment for the offences for which the applicant was convicted at trial (negligently causing serious injury) was 10 years; whereas the maximum term of imprisonment for the offences for which he falls to be sentenced in this Court (dangerous driving causing serious injury) is five years.

Judge's reasons for sentence

134 In sentencing the applicant for six counts of dangerous driving causing serious injury, we are not engaged in any review of the judge's reasons for sentence given in respect of the six charges of negligently causing serious injury. Nevertheless, it is instructive to examine some of his Honour's findings made when he sentenced the applicant for the same conduct which now falls to be considered by

us.

135 The judge concluded that the driving of an 11 tonne bus with 14 passengers, while failing to observe any of the warning signs to which we have referred, or even the bridge itself, was 'a serious example of the relevant offending'.[64] The judge concluded that general deterrence was the principal sentencing factor, saying that it 'must be made plain to all that a failure of the gravity of [the applicant's], will attract stern punishment'.[65]

136 As the judge noted, however, at the time of the applicant's offending, he was 53 years of age, had two adult children, had been married for 25 years and had 'lived an exemplary life'.[66] The judge accepted (as do we) that the applicant had been a good father and husband; had served his community well in a myriad of ways; and had an exemplary work ethic, having worked hard since the age of 17.[67]

137 Further, the judge noted that the applicant had himself suffered a broken neck as a result of the collision, and had been required to wear a neck brace for some three months.[68]

138 The judge referred to references which had been tendered,[69] which disclosed the very high regard in which the applicant was held (and is still held) in his community.

139 Additionally, the judge referred to relevant psychological reports disclosing the existence of a post-traumatic stress disorder ('PTSD') and the onset of significant psychological symptoms following the collision.[70] At the time of sentencing, the judge had before him the evidence of two psychologists, Mr Jeffrey Cummins and

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64 *DPP v Aston* [2018] VCC 2258, [49] ('Reasons').

65 Ibid [50].

66 Ibid [51].

67 Ibid.

68 Ibid.

69 Ibid [52]–[58].

70 Ibid [61]–[67].

Mr Jeff Pemberton. The psychological evidence was that the applicant was then suffering from post-traumatic stress disorder caused by the collision. His mental health symptoms at the time of the plea were described as 'severe to very severe'. Both psychologists expressed the opinion that the applicant's mental condition would have a very significant impact on his ability to cope with imprisonment. Mr Pemberton also expressed the opinion that prison would be detrimental to the applicant's psychiatric condition, stating:

> His PTSD symptoms including flashbacks, suicidal thoughts, would likely worsen and entrench still further feelings of guilt, resentment and isolation. Treatment prognosis would become less predictive and [the] overall outcome much less positive.

140 The judge was satisfied that the applicant was genuinely remorseful and (albeit with 'some equivocation') accepted responsibility for the collision.[71] In those circumstances, the judge determined that specific deterrence was of no relevance in the present case.[72] We agree.

141 The judge accepted that the applicant's prospects of rehabilitation were excellent. Again, a proposition that we would not cavil with having considered the matter afresh for ourselves.

142 The judge concluded his sentencing remarks by saying:

> In the end … general deterrence, that is deterring other drivers from being inattentive in serious breaches of their duty of care to other road users and their passengers, is the principal sentencing factor I must take into account. Specific deterrence, as I have indicated, is of no moment in this case. But there is also a need for there to be just punishment for this elongated inattention to your duty of care to your passengers. The sentences that I pass involved denunciation of the lengthy and deplorable inattention to your duty of care to keep a proper look out. I have taken into account the need to pass sentences that in total are appropriate.[73]

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71 Ibid [69].

72 Ibid [69], [72].

73 Ibid [72].

Parties submissions on sentence in this Court

143 In the course of submissions, counsel for the applicant tendered various certificates relating to courses completed by the applicant while in custody, records from Justice Health relating to the applicant's physical and mental health, an affidavit from the applicant's wife dealing with the impacts of the applicant's incarceration upon her and their children and a written summary of the material in the Justice Health records and the applicant's wife's affidavit.

144 The material tendered in relation to the applicant's mental health discloses that the predictions made by Mr Cummins and Mr Pemberton at the time the applicant was originally sentenced were well-founded. For present purposes, it is sufficient to note that, during the course of argument, senior counsel for the respondent accepted that, in imposing sentence on the applicant, all of the principles identified in *Verdins*,[74] except those relating to moral culpability, were engaged.

145 Relying upon the material she tendered on behalf of the applicant in this Court showing the very significant effects of the applicant's incarceration on his family, counsel for the applicant submitted that the exceptional circumstances test in *Markovic*[75] was made out. The hardship to the applicant's family, which the applicant's counsel described as 'personal', was a matter which this Court should take into account in conformity with the principles referred to in *Markovic*.

146 We do not propose to set out the detail of the personal circumstances of the applicant's family that gives rise to the hardship disclosed in the tendered material. The circumstances were correctly described by counsel for the applicant as personal. It is not necessary to set them out because, in submissions in reply, the Crown accepted that the evidence tendered satisfied the exceptional circumstances test in *Markovic*, and thus fell to be considered by us accordingly. This concession was well-founded on the material tendered in this Court.

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74 *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

75 *Markovic v The Queen* (2010) 30 VR 589 ('*Markovic*').

147 The applicant submitted that in the very unusual circumstances of his offending and his personal circumstances, a CCO was open and should be imposed by this Court. Counsel for the applicant submitted that in light of the period of time the applicant has spent in custody, a CCO on its own was the appropriate disposition. It was submitted that it was not necessary to impose a term of imprisonment with a CCO and then to declare the amount of pre-sentence detention already served.

148 In response, the Crown accepted that a combined term of imprisonment and CCO was an open sentencing disposition. The Crown submitted, however, that a CCO alone was not appropriate.

Analysis

149 As the judge observed when sentencing the applicant for six counts of negligently causing serious injury, the present case is a difficult one so far as the sentencing disposition is concerned.[76] There are powerful but competing sentencing considerations that must be synthesised to produce a just outcome which satisfies the purposes for which sentence is to be imposed.[77] Balanced against the seriousness of the applicant's offending is his exemplary character and conduct over the entirety of his life, together with the powerful mitigating matters relating to his current mental functioning and family hardship to which we have already referred.

150 While the applicant's offending was undoubtedly serious, it is also to be observed that none of the aggravating features so often seen in offending of this kind were present in this case. No drugs were involved. No alcohol was involved. Speeding or other wanton breaches of the road rules were not involved. For whatever reason, a man of previously impeccable character drove in a way that placed himself and his passengers in a position of danger, culminating in serious injuries being sustained. Of some note is the fact that none of the victims of the

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[76] Ibid [56].

[77] As to which, see s 5(1) of the *Sentencing Act 1991*.

applicant's offending have chosen to submit victim impact statements. To the contrary, at least two of his victims have been prepared to express the opinion that the sentence first imposed upon him was too high.

151 That said, and albeit in respect of the offences of which the applicant was first convicted, there is force in the trial judge's observation that the sentence imposed must deter others from driving in a way that falls as short of the standard expected of a driver (or more accurately, so far as the present charges are concerned, so as to deter others from driving dangerously) as occurred on the day of this collision. Equally, however, such punishment as must be imposed should be no more than to serve this and other relevant sentencing purposes.

152 The circumstances of the applicant are quite exceptional. He suffers from significantly impaired mental functioning as a result of the collision. He was himself seriously physically injured, breaking his neck in the collision. The hardship on his family caused by his incarceration meets the exceptional circumstances test in *Markovic*.

153 Moreover, the applicant is a man of previously impeccable character. He has shown great remorse. His prospects of rehabilitation are excellent. There is a serious risk that further imprisonment will have a significant adverse effect on his mental health. This, of itself, requires a mitigation in his punishment.[78]

154 Further, the applicant should be given credit for the utilitarian benefit associated with the way in which he conducted the trial (not seeking to dispute the primary facts involved in the circumstances of his driving) and in agreeing to this Court convicting him of the six charges of dangerous driving causing serious injury.

155 All of that said, we are not persuaded that this is a case where it is appropriate merely to impose a CCO. Ordinarily, a person who commits the offence of dangerous driving causing serious injury can expect to be sentenced to a term of

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78 *Verdins*, 276 [32] (proposition 6).

imprisonment that is longer than the maximum period that is permitted to be combined with a CCO (12 months).[79] But for the powerful array of mitigating factors in this case, the applicant could have expected to receive a custodial sentence of greater than 12 months.

156 In our view, there is force in the Crown's submission that a CCO should only be imposed in this case in combination with a term of imprisonment. The offences committed by the applicant, and for which he now falls to be sentenced, are too serious not to impose a term of imprisonment as part of the sentencing disposition in this case.

157 Currently, the applicant has spent 305 days in custody (not including today). He has been assessed as suitable for a CCO. In our view, all of the purposes of sentencing[80] are met by imposing a combined sentence of imprisonment (for the period of time the applicant has already spent in custody) with a two year CCO on appropriate conditions. It is the lack of aggravating circumstances surrounding the applicant's offending, the unusual circumstances of his offending, and his truly exceptional personal circumstances, that have led us to conclude that a combination sentence of time served with an appropriately conditioned CCO is the appropriate disposition in this case.

Orders

158 We will make orders granting the applicant leave to appeal against conviction; allowing his appeal; setting aside the convictions and sentences imposed below; entering a judgment of conviction on six counts of dangerous driving causing serious injury; and sentencing the applicant to an aggregate sentence of 305 days imprisonment and a CCO of two years' duration containing the conditions referred to in s 45 of the *Sentencing Act 1991*, and a condition that the applicant undergo such psychiatric treatment as directed by the Secretary to the Department of Justice in

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79 See s 44(1) of the *Sentencing Act 1991*.

80 See s 5(1) of the *Sentencing Act 1991*.

accordance with s 48D of the *Sentencing Act*.

159 The cancellation of the applicant's licences by the County Court will be confirmed. The period of disqualification, however, will be reduced from three years from 17 December 2018 to 18 months from that date.[81]

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[81] See ss 89(1)(a), (2)(a) and 89B of the *Sentencing Act 1991.*